A

LETTER

TO THE

HON. G. E. CARTIER,

ATTORNEY GENERAL,

ON THE

BILL INTRODUCED BY HIM, IN PARLIAMENT,

INTITULED

"AN ACT RESPECTING REGISTRY OFFICES, AND PRIVILEGES AND HYPOTHECS IN LOWER CANADA."

BY

R. MACKAY,

ADVOCATE.

Montreal.

1860.

To the HON GEORGE E. CARTIER, *Atty. Gen. (East), M P.P.*

SIR,

I have, by chance, seen the Bill lately introduced by you, nominally on subject of Registry Offices and Privileges and Hypothecs.

As it involves considerable changes, affecting numerous interests, public and private, it deserves more attention and examination than are usually given to our Acts of Parliament.

This is my apology for taking up the subject in this letter, which I take the liberty of addressing to you, because you have introduced the Bill referred to; because, not only as a public man, but as a private citizen, you have had many opportunities of forming opinions upon the matters treated of, and because I believe that I have had *some*. I beg that you will believe that I am not moved by party considerations.

The subject is not generally very clearly understood. I do not pretend in this letter, written in the midst of professional occupations, to do more than state some ideas. Their publication may suggest more.

Let us enquire into our present system of registration, and of purgation of hypothecs; what are its defects; how improve it; does your Bill remove defects acknowledged?

Our Registry system may be said to have been created by the Ordinance 4 Vic., which has been followed by a number of Acts passed subsequently.

It is true that portions of the Province had, previously to

1841, been subject to such laws; but the Ordinance of the 4 Vic., first introduced *a general system*, and it made great changes in the law, while some of its enactments were retroactive.

After an experience of nearly twenty years we are warranted in saying that the predictions of those who thought that *that* Ordinance would do harm have not been verified to any material extent; few have suffered from non-observance of its requirements; its beneficial influence has been felt in many ways.

The 4 Vic., has been altered by several Statutes, and some of these by others; portions of some, nearly of all, of them are in force, and portions repealed; some enact the same thing twice over with additions.

It must be conceded that the system is not perfect. We may say of it, nevertheless, what a celebrated writer said in 1833 of the then French one, "take it altogether, its defects are neither so enormous, nor so numerous, as some people think."

It *has* defects which your Bill omits to remedy.

There are now too many modes of registration. I wish you had abolished one of them, that by extracts. The other two are ample; in fact, the mode by transcription is so far superior to all others that it has been, nearly universally adopted. Only in special cases is that by memorial resorted to. In Montreal, during twelve months, not one dozen memorials have been registered, exclusive of those for arrears of interest.

I CONSIDER IT ANOTHER defect that actions *en resolution de vente* for non-payment of price are not restrained. Where the vendee may have transferred the land to a third person, *bona fide* registered purchaser, I would not allow the vendor to bring the action *en resolution*, though his vendee may not have paid him. At present, the vendor has two guarantees: one entitling him to the resale of the land, in order to his obtaining his due, out of the proceeds of sale, the other entitling him to the *action resolutaire*, the judgment in which annuls the sale, and gives him the land again; the former is subject to publicity, not so the latter. A vendor may neglect registering, announce no claim, and yet eject third persons, and ruin *them*, or hypothecary creditors. This ought not to be, and therefore I wish that there had been in

your Bill an enactment such as *has, at last, been made in France*, for the protection of third persons in good faith.

IT IS A DEFECT in our system that a man may sell what he does not own. And there is an anomaly, for while he may do *that*, he cannot do the less thing, mortgage what he does not own.

THE SALE of the property *d'autrui* should be null and prohibited.

YOU WOULD have done good by abolishing the 7 Vic., c. 22, § 9, and the 8 Vic., c. 27, § 7. At present, nothing shows to a certainty who is proprietor of a land. You may treat with a person having all the appearance of owner, and be disappointed. Under a sound system this could not be.

THE HYPOTHEC from a judgment is, at present, confined to land owned by the Defendant at the date of it, so the judgment is of less use against a Defendant having no land, but likely to acquire some afterwards, than it ought to be. Injustice often results. In France a judgment registered strikes the lands of a Defendant, though acquired after its date, and the original inscription suffices to affect even the after acquired lands. In Upper Canada, in New York, and in Louisiana, a judgment may affect after acquired lands of a Defendant in the same way. It would be an improvement to give like privilege to future judgments registered in Lower Canada.

The law regulating PURGATION OF HYPOTHECS is the 9 Geo., IV. It is not such a bad law as sometimes represented. Nevertheless, it might be improved. The chief complaint against it has been gotten up in the interest of absentees, and persons present neglecting to fyle oppositions. It is said that such persons have sometimes suffered; and so they have. Some would therefore have the law not to prejudice absentees; but if land be worth having it is worth attending to, and persons intending to absent themselves ought to appoint somebody to watch their interests. Provision might be made, however, for a particular notice to them.

You have had in view to protect such persons. I attribute to

your desire so to do the enactments in your Bill to the following effect:—

The applicant for a judgment of confirmation shall, at the time when he makes his application for such judgment, file in the office of the Court, a certificate of the Registrar of the proper County or Registration Division, shewing the hypothecs which are registered:

1. Against the property to which the judgment is to apply, whenever any hypothec is so registered; or

2. Against any party who, within ten years next preceding the date of the title sought to be confirmed, has been the owner of such property; or

3. Against the immediate *auteur* of the party who owned the property at the commencement of the said ten years;

4. And which do not appear by the Books of such Registrar to have been wholly discharged;

Such certificate shall state also the date of every instrument registered as creating or evidencing any such hypothec, the date of its registration, and the name of the Notary or Notaries before whom such instrument was passed, if it be notarial, and shall mention, as to each hypothec, any partial discharge registered, and the sum which appears to be due for principal and interest; and if the registration of any such hypothec has been renewed, the certificate shall mention every such renewal and the date thereof;

6. If the applicant is willing that the judgment of confirmation be rendered subject to the hypothecs mentioned in the Registrar's certificate, he shall file, in the Office of the Court, a declaration to that effect, and it shall be so rendered accordingly;

2. But if the applicant desires that the judgment of confirmation shall discharge the hypothecs upon the property, he shall, when he files such certificate, pay into Court the price (if any) mentioned in the Title to be confirmed, or which he has made up by bidding in the manner allowed by the said Act; and if it appears by the Registrar's certificate filed as aforesaid, that there are no charges on the property, and if no opposition is filed, or maintained by the Court,—or if such price be sufficient to pay all the charges mentioned in the said certificate and in the oppositions (if any) filed in the case and maintained by the Court, and all costs,—the judgment shall, in either case, be pronounced purely and simply;

3. But if such price be not sufficient to pay such charges and costs,—or if there be no price mentioned in the Title to be confirmed,—the Court or any Judge thereof shall, at the instance of the Applicant for the judgment, appoint two *Experts*, and the Applicant shall appoint one, and such three *Experts*, or a majority of them, shall value the property, and report the value thereof on oath, in writing under their hands, to the Court;

4. And if the value so reported be either less than or not greater than the price paid in by the Applicant as aforesaid, such price shall be deemed to be the value of the property, and the judgment shall be pronounced purely and simply; but if the value so reported be greater than such price, or if there be no price mentioned in the title to be confirmed, the Applicant shall pay into Court the difference between the price and the value so reported or the whole of the value if there be no price, and the judgment shall then be pronounced purely and simply.

8. The price or value, so paid into Court, shall be distributed by the Court in due course of law, among the opposants (if any) and the privileged and hypothecary creditors mentioned in the Registrar's certificate, according to the order and rank of their respective privileges and hypothecs, and as if each of them had filed an opposition according to the practice heretofore in use;

2. The Registrar's certificate shall be *primâ facie* evidence of the facts therein mentioned; but any such fact, or any matter to which such certificate relates may be disputed, or the payment or part payment, prescription, or extinction in any way, and in whole or in part, or the non-exigibility for any cause or reason whatever of any hypothec mentioned in the Registrar's certificate, may be alleged and pleaded by any party interested, and the Court may then receive evidence contradicting or modifying any statement or the effect of any statement in such certificate and give judgment accordingly, and no notice of any such proceeding, to or upon any party not appearing in the case shall be necessary unless specially ordered by the Court.

Means might be contrived, and easily contrived, to give particular notices to all hypothecary creditors. If such notices were provided for, the enactments you propose would be uncalled for.

Had our Registry Ordinance ordered an election of domicile to be made by persons registering, we might amend the 9th George IV., by ordering a notice to be given to creditors at such

elected domiciles. We have only to do a little more now : enact a clause or two, and so secure to creditors, absent or present, a particular notice of applications for Ratification of Title. It might be enacted that any hypothecary creditor might enter a *caveat* in the office of the Clerk of that Court to which application for a sentence of Ratification or Confirmation, as regards land on which he has a mortgage, can be made ; such *caveat* to be signed by the creditor, to describe the land mortgaged, and to mention some certain place of address, within the jurisdiction of the Court, to which notice respecting any application for confirmation might be sent, the maker of such *caveat* to be entitled to notification, at the place mentioned, (à peine de nullité) of the deposit of any Title Deed for purpose of Ratification, and of the day when, and the Court where, application is intended to be made ; the Ratification to be signed in duplicate by the proposing applicant, or his Attorney, and one part be served by a Bailiff or Notary, within 15 days after the day of deposit of the Title Deed.

Of course it would be required to go into some details, such as ordering the Prothonotary to keep a book for entering such *caveats*, for granting access to it freely to the public, for informing the Court of any *caveats* entered, &c., &c.

If such enactments were made, if greater publicity were ordered to be given to the advertisements of applications proposed for Sentences of Ratification, if more ample notices were ordered, and if one or two provisions were made towards compelling, but only in certain cases, the deposit of the price, or value, of the land, our Act of Geo. IV. would work not badly. Four publications in the *Canada Gazette* might be ordered, instead of three, and mention might be ordered to be made of all the proprietors of the land during the ten years next before the date of the Deed, instead of during the three years only as at present.

The Crown ought to be bound by the Purgation of Hypothecs' Act, as it is by the Registry Law.

Your proposed changes will lead to delays and embarrassments, and will sometimes prevent transactions. They will impose great labor and responsibility upon the Registrars. The Certificates required by your Sect. 2 will be confused.

Any person acquainted with Lower Canada, the kinds of claims registered, and of certificates given by Registrars, will be able to judge of this.

All manner of Deeds and papers have been registered. Many are obscure, and of doubtful construction, giving a right to M, if one construction be correct, and if another to N.

Registrars' certificates in many cases shew claims against Estates long after they have been extinguished. It may be hard to get *radiations* in some cases, and your act may give confidence to some people in bad faith to deny payments made years ago. Nominal creditors, *per* such Registrars' certificates, may be dead or may not appear, and evidence to contradict their claims, to the satisfaction of Courts and Judges, may be hard to get.

The second, third and fourth sub-sections of your Sect. VI. will tend to make Real Estate less saleable than at present. It would be better not to make it, in all cases, where purgation of mortgages is sought, necessary to pay into Court the price. There are many cases in which this would be an idle, and inconvenient ceremony. If those creditors who alone have interest in the price, who alone *can* be paid out of it, consent to the Judgment passing without the price being really "paid into Court," why order it to be paid.

The third sub-section referred to will hinder people in selling their lands. Many a man will agree to buy a land, but only at *a* fixed price—say £500, or £1000. A person under your you proposed sub-section would be foolish to buy without stipulating for a Ratification and without a clause *resolutoire* in his Deed; for, after his buying say at £500 an *expertise* being ordered, such as you propose, the land bought might be reported worth £550, or £50 more than he agreed to pay, or would be willing to pay, for it. Yet he could not, when there were more creditors than the value of the land could satisfy, get a Ratification without paying such £50; I need not say that unless Ratifications can be assured to purchasers fewer sales will be.

If you wish to bring capital into the country, make land easily transferable, make purgation of hypothecs easy; it can

be done without wrong to any body. Give creditors the full value of their *gage*. But let something depend upon their own common diligence ; COMPEL THEM TO OPPOSE. Let them overbid if the price mentioned in any Deed appear unfair, or too small. Give them particular notices. All this can be done by our present law with a few additions to it, such as I have mentioned.

Section 16 of your Bill looks out of place. It has little to do with a Bill intituled as yours is. It does not look like your work. Depend upon it that the tendency of such legislation cannot be to make landed proprietors quiet, or to bring capital into the country : the object you have in view. Here is the section I refer to :

16. And for the avoidance of doubts, it is hereby *declared* and enacted, that no adjudication of any real property by the Sheriff, or in any case of Forced Licitation, *has vested* or shall vest in the *adjudicataire* any greater or better title to such property than was vested in the party or parties upon whom it was seized, or as belonging to whom it was put up for sale in such case of Forced Licitation ; And that no such adjudication *did* or shall remove or discharge any servitude to which the property was theretofore subject, and that all servitudes in favor of any property so adjudged, *have passed* and shall pass with it and be enjoyed by the *adjudicataire* and his *ayant cause*, nor shall any opposition to preserve any such servitude be allowed, and if any be made, it shall be dismissed with costs.

If that section pass into a law it will unsettle some estates, and give rise to miserable law suits. Nine years ago, A may have bought a lot of land at Sheriff's sale, upon which was a *servitude occulte*, not announced at the sale, and in respect of which no opposition a fin de 'charge was fyled. A so buying that land took it freed from that servitude. Nobody can dispute that. Seven years ago he may have sold to B, with promise of warranty against all dowers and servitudes ; 5 years ago B may have sold to C with like warranty. C, B and A ought to feel quiet in their properties. *The law tells them to feel so ;* at present they need not doubt, but may be quiet ; let your Sections pass, and what may be the result ? An action may be brought against C, claiming right to *that servitude occulte ;*

this action may repose chiefly on your declaratory law. C in such case will be troubled and condemned with costs, and he will go against B, or B against A.

During 59 years, up to this the moment of my writing, the law has *not* been as, or what, you propose to declare. I place in parallel columns your proposed enactment, and the law:

YOUR SECTION XVI.	THE LAW.
And for the avoidance of doubts, it is hereby declared and enacted, that no adjudication of any real property by the Sheriff, or in any case of Forced Licitation, *has vested* or shall vest in the *adjudicataire* any greater or better title to such property than was vested in the party or parties upon whom it was seized, or as belonging to whom it was put up for sale in such case of Forced Licitation; and that no such adjudication *did* or shall remove or discharge *any servitude* to which the property was theretofore subject, and that all servitudes in favor of any property so adjudged, *have passed* and shall pass with it and be enjoyed by the *adjudicataire* and his *ayant cause*, nor shall any opposition to preserve any such servitude be allowed, and if any be made, it shall be dismissed with costs.	41 Geo. III, c. 7, § xi. [p. 114, Revised Statutes of 1845.] And be it enacted, &c., That no opposition to the sale of any immoveable property seized by the Sheriff, by virtue of a writ of execution, whether such opposition be *a fin d'annuller* or *a fin de distraire*, the whole or a part of the property so seized, or *afin de charges*, or SERVITUDES in the same, shall be lodged in the hands of the Sheriff, or received by him, except previous to the fifteen days next before the day fixed for the sale and adjudication thereof; * * * provided that the Sheriff shall have made known, in his publication of the sale of the said immoveable property, that such opposition shall not be received during the fifteen days previous to the sale of the same, as above enacted: Provided, nevertheless, that the person who shall neglect to make such opposition before the fifteen days above mentioned, shall still have the power of converting his right to such opposition to an opposition *afin de conserver* on the proceeds of the sale of the said property, which he may always fyle within the time fixed for lodging such opposition *afin de conserver*. —*Guyot. Rep. Vo.* "*Servitude.*"

The first portion of your section XVI is plausible, and looks reasonable. It seems just, that no purchaser at a Sheriff's sale should get more than the *saisi* had, or land otherwise than as the *saisi* held it. Still, in the case of the *servitude occulte* which I have mentioned, and in several other cases, the purchaser of land, at Sheriff's sales in Lower Canada, has heretofore, fre-

quently, after the sale, had a property more free than the *saisi* held it. I could easily state other cases in which your section XVI will work gross injustice, if it pass.

I could drive half of the capital now in the Province out of it, by one or two short declaratory enactments. Suppose you were to declare that no Bank Stockholders ever had limited liability, but always were and shall be held liable *in solido* for all debts of the Bank. It would strike people as outrageous. Your section XVI is as unjust as would be such legislation.

Time fails me for many more remarks on the present occasion. Suffice it to say that your ideas on the subject of Plans of all Registry Districts, and of all lands in them, seem good. Your seventeenth section, translation from the *Code Civil*, is also good.

And now, dear Sir, begging that you will excuse the imperfections of this epistle,

I remain,
Your obedient servant,
R. MACKAY.

MONTREAL, May 16th, 1860.

P. S.—I see by the Papers of this morning that your Bill has passed in the Lower House, with amendments. Nevertheless, the circulation of my letter may do no harm.

R. MACKAY.

19th May, 1860.

HON. G. E. CARTIER,
Atty. General, &c.,
QUEBEC.